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Supreme Court of the United States.

October Term 1923.

No. 205.

THE UNITED STATES, *Appellant*,
v.
ALPHONSE GAY.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

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I. STATEMENT OF THE CASE.

Alphonse Gay filed a petition in the Court of Claims claiming pay as a warrant officer, a machinist, on the list of officers of the Navy retired from active service, from May 1, 1916, to June 12, 1922 (Second amended petition, rec. pp. 1, 2; supplemental petition, pp. 3, 4.)

The facts are set forth in the findings of the Court of Claims (rec. 5–7). The summary in brief for United States (pp. 1–4) should be ignored as inaccurate and argumentative. The court decided that the officer was entitled to his retired pay as a machinist and gave judgment accordingly. The opinion was delivered by Judge Hay, and is reported 57 C. Cls. 424. The United States appealed (foot p. 10).

II. BRIEF OF ARGUMENT.

The opinion of the Court of Claims so clearly states its conclusions that this brief will be arranged in the

order of the opinion, quoting each of its parts, followed by supporting authorities.

Never Dismissed from the Navy.

The opinion opens (Record, pp. 7, 8):

"This is a suit brought by the plaintiff to recover the retired pay of a machinist in the Navy, the plaintiff having been retired as a machinist on November 23, 1908. He was paid his retired pay from the date of his retirement up to May 1, 1916, but since that date his retired pay has been withheld, and he alleges that there is now due him the sum of $10,078.90 [amended to $10,302.52]. He was notified on June 19 and July 25, 1916, by the pay officer of the New York Navy Yard, that that officer had been directed by the Navy Department to make no further payments to him. On September 1, 1916, he wrote to the Chief of the Bureau of Navigation, Navy Department, Washington, D. C., requesting to be informed why his pay had been stopped. To this letter no response was made, and on May 24, 1917, he brought this suit in this court.

"The effect of this action of the Navy Department was to remove the plaintiff from his position as a retired officer of the Navy and to deprive him of his rights as such and of the emoluments guaranteed him as such retired officer without giving him an opportunity to be heard. The reasons given for this action by the Navy Department are that the plaintiff under the act of March 2, 1907, should be officially regarded as having expatriated himself; and that having so expatriated himself the plaintiff had abandoned his office as a machinist in the Navy in view of the requirement of the law and regulations that officers of the Navy must in all cases be citizens of the United States. It will be observed that these reasons and conclusions were never communicated to the plaintiff, and he was given no opportunity to make answer to them."

This summary is to be read in connection with the more detailed statement contained in the findings

(Finding III, pp. 5–7). These findings show that in fact the appellee was never dismissed from the Navy. On the contrary, he continued to be recognized by various officers of the Navy Department, as well as by the Naval Attaché at Paris, as an officer of the Navy down to about three months of the time that the pay officer of the New York Navy Yard notified him that the pay officer had been directed by the Navy Department to make no further payments to him (Finding III, near top p. 7). It does not even appear directly that such instructions were sent, but only that the pay officer alleged that they were. No actual removal was attempted. Such removal would not only have been unauthorized, but is directly prohibited by the following provisions:

Revised Statutes, Sec. 1229. * * * And no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of a sentence of a court-martial to that effect, or in commutation thereof.

Sec. 1624. The Navy of the United States shall be governed by the following articles:

Art. 36. No officer shall be dismissed from the naval service except by the order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof.

Art. 64. Within the meaning of the foregoing articles unless there is something in the context or subject matter repugnant to or inconsistent with such construction, officers shall mean commissioned and warrant officers, and paymasters' clerks; superior officers shall be held to include mates and petty officers of the Navy and noncommissioned officers of the Marine Corps, in addition to the officers enumerated. This article is not one of the "Articles for the Government of the Navy," as contained in the statutes, but is appended in explanation thereof.

The construction of the word "officers," in the above article as including a warrant officer is in accordance with the decision of this court in *Brown* v. *United States*, 113 U. S. 568, 570, in which it was held that when the term "officer" is used in a statute relating to the Navy it includes a warrant as well as a commissioned officer.

Warrant officers of the Navy are appointed by the President. Revised Statutes, Secs. 1405, 1406. Machinists are created as a class of warrant officers by the Navy Personnel Act of March 3, 1899 (Chap. 413, Secs. 14, 15, 30 Stat. 1004, 1007, 1008). Like other officers, they may be dismissed only by sentence of court martial. *Stokes' Case*, 28 Opns. 325.

In *United States* v. *Redgrave* and *Perkins*, 116 U. S. 474, 483, it was held that where under a mistake of law the Navy Department undertook to discharge a cadet engineer from the naval service at the end of his academic course at the Naval Academy, such action is invalid as against statutory provisions prohibiting the discharge of such cadet otherwise than for misconduct or upon sentence of a court-martial (116 U. S. 485).

In *Runkle* v. *United States*, 122 U. S. 543, a retired officer was sentenced by court-martial to dismissal from the Army. The proceedings were approved by the Secretary of War, but not by the President. A subsequent President disapproved them. It was held that the order of dismissal required by law the approval of the President to be effective, and that the officer had never been out of the Army.

In *United States* v. *Wickersham*, 201 U. S. 390, an officer in the civil service was dismissed by a local superior, but not by the appointing power, the head of the department. The court said (p. 399):

"We see no reason in such an attitude of the case,

where the wrongful suspension is clearly established, and the ability of the incumbent to discharge the duties of his office affirmatively found, for withholding from him the compensation given by law to an incumbent of the place. If this be not so, then a regular and duly qualified employeé in the public service protected by this statute and the orders of the President made in pursuance thereof, can be deprived of the benefitand emolument of his position by a wrongful and illegal suspension from his duties. We do not think that such a contention can be sustained either by reason or authority. Where an officer is wrongfully suspended by one having no authority to make such an order, he ought to be, and is, entitled to the compensation provided by law during such suspension."

Far from being removed, he was continuously recognized as an officer of the Navy down to the time of the stoppage of his pay, and even afterwards.

The jurisdiction of the Navy Department over this officer was asserted by the orders given him January 11, 1916, and again February 24, 1916, direct from the Navy Department requiring a report from him to the Naval Attaché at Paris by letter. With these orders he promptly complied. March 15, 1916, he expressed his readiness and willingness to leave Switzerland whenever recalled to the United States by the Navy Department (Rec. Finding III, first half p. 6). The control of the Navy Department over him as a part of the naval service of the United States was thus strongly asserted by the Navy Department and acknowledged by himself down to within two months of the time his pay was discontinued.

No notice was given him of any removal. An application to the Chief of the Bureau of Navigation asking why his pay had been stopped met with no response (p. 7, Par. 3).

November 12, 1917, he wrote the Bureau of Navigation offering his services on sea or on shore. It was stated at that time, "There is at present no duty in this office to which the above subject might be assigned" (middle p. 7).

The annual Navy Registers, made up as of the first of January of each year, showing the exact status of every officer, active and retired in the Navy, show him down to and including January 1, 1917, as a machinist on the retired list of the Navy, and under the column "Present residence or duty," he is listed "Abroad." This last date was eight months after that from which he had received no pay. (See "Register of the Commissioned and Warrant Officers of the United States Navy and Marine Corps," January 1, 1917, House Doc. 1758, 64th Cong. 2d Sess. pp. 218, 219.)

Status of Retired Officers.

A retired officer remains a part of the available military force of the country. By act of June 7, 1900 (Chap. 859, 31 Stat. 684, 703), "Any naval officer on the retired list may in the discretion of the Secretary of the Navy be ordered to such duty as he may be able to perform at sea or on shore." This statute was limited to twelve years, but was reenacted August 22, 1912 (Chap. 335, 37 Stat. 328, 329), without time limit and with the insertion of the words "with his consent."

It was decided in *United States* v. *Tyler*, 105 U. S. 244, 246, that retired officers of the Army still remain a part of the Army. The same point was stated in an amplified form in President Wilson's veto message of the Army appropriation bill of 1916 objecting to a provision of the revised Articles of War in that bill exempting from military jurisdiction retired officers not on

active duty. He said (House Doc. 1334, 64th Cong. 1st Sess. p. 2):

"Courts and Attorneys General have, in a long line of decisions, held that officers of the Army on the retired list hold public office. It thus appears that both the legislative and judicial branches have drawn a sharp distinction in status between retired officers, who are regarded and governed at all times as an effective reserve of skilled and experienced officers and a potential source of military strength, and mere pensioners, from whom no further military service is expected. Officers on the retired list of the Army are officers of the Army, members of the Military Establishment distinguished by their long service, and as such examples of discipline to the officers and men in the active Army. Moreover, they wear the uniform of the Army, their education and service hold them out as persons especially qualified in military matters to represent the spirit of the Military Establishment, and they are subject to active duty in time of national emergency by the mere order of the Commander in Chief. They are, therefore, members of the Army, officers of the United States, exemplars of discipline, and have in their keeping the good name and the good spirit of the entire Military Establishment before the world. Occupying such a relation, their subjection to the Rules and Articles of War and to trial by general court-martial have always been regarded as necessary in order that the retired list might not become a source of tendencies which would weaken the discipline of the active land forces and impair that control over those forces which the Constitution vests in the President."

Act of 1907, Sec. 2 (34 Stat. 1228) Construed.

The Court of Claims thus quoted and construed this act (pp. 8, 9):

"The provision of the statute under which the Navy Department held that the plaintiff had expatriated himself is as follows (34 Stat. 1228):

"'Sec. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conformity with its laws, or when he had taken an oath of allegiance to any foreign State.

"'When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however*, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also*, That no American citizen shall be allowed to expatriate himself when this country is at war.'

"The act (Ch. 2534) is entitled 'An act in reference to the expatriation of citizens and their protection abroad.' The purpose of the act is to relieve the Government of the obligation to protect citizens residing abroad after the limit of two or five years, when their residence there is not shown to be of such a character as to warrant the presumption that they intend to return and reside in the United States. After the time limit has expired it is presumed that the citizen does not intend to return, and it is necessary, in order that he may have the protection of this Government, for him to show affirmatively that it is his bona fide intention to return to the United States to live. The essential thing under the act is the intention to return to and reside in the United States. Op. Atty. Gen. 28, 504, 508, 509. The provisions of the act are penal and are not to be extended to include any persons not within its purview."

The opinion thus referred to in *Gossin's* case, 28 Opns. 504, 508, 509, was to the following effect:

A native of Syria, naturalized in the United States, left this country for his native land, married a Syrian woman, and remained in that country for more than two years without making the required declaration of inten-

tion to return to the United States. After a lapse of two years, he returned to the United States accompanied by his wife. Their right to enter this country being questioned, the Attorney General held that both husband and wife were citizens of the United States, and as such were entitled to be admitted to the country. It was held that any presumption arising from foreign residence was rebuttable.

The history of the act is thus stated in that opinion (28 Opns. 508–510):

"As above stated, the act is entitled 'An Act in reference to the expatriation of citizens *and their protection abroad*,' and it appears that it was passed at the instance of the Department of State. In reporting the bill to the House, the Committee on Foreign Affairs said (House Report 6431, 59th Cong. 2d Sess.):

"'This bill follows in its general lines the recommendations of the Department of State. * * *

"'Perhaps the most important provision of the bill is desired by the State Department to guard against complications in which this country has often been involved. All desire that the flag of this country should protect an American citizen to the fullest extent. But none of us desire that some foreigner who does not intend to cast his lot permanently with us should endeavor to avail himself of the flag as a fraudulent protection. Many foreigners come here, become naturalized, and then return to their own countries or migrate to other parts of the world without any intention of returning to this country. They have not become citizens in good faith, but they seek to avail themselves of the protection of our citizenship in avoiding responsibility to which they may be subjected in other parts of the world.

"'This is not right. The citizenship of the United States should not be sought or possessed for commercial or dishonest ends. To guard against this evil, this bill provides that a naturalized citizen who leaves this country and dwells elsewhere continuously for five

years shall be presumed to have abandoned his citizenship. This presumption can be overcome, but such a provision as this would be a great assistance to the Department of State, would avoid possibilities of international complications, and will prevent those who are not entitled to its protection from dishonestly hiding under the American flag.'

"As further showing the purpose of the act, the remarks of Mr. Perkins, who reported the bill from the committee and had charge of it in the House, are pertinent. In the course of debate it was said (Cong. Rec. Vol. 41, pt. 2, p. 1466):

"'Mr. Bennet of New York. Mr. Speaker, I entirely agree with the gentleman from Colorado (Mr. Bonynge) as to section 3. I think it is too broad. In addition to the consideration that he urged upon the House, there is also the consideration of property rights and of property rights inhering in American-born citizens who might take through these foreign-born naturalized citizens. This bill will apply to a man who has now been abroad four years and eleven months, and if he remains abroad the other month he would be forced, under this statute, to become no longer a citizen of the United States, but a citizen of the country where he was.

"'Mr. Perkins. Allow me to correct the gentleman. That certainly is not the result of the statute at all.'

"'Mr. Bennet of New York. Why not?'

"'Mr. Perkins. The statute provides that, having remained there five years continuously, there shall be a presumption which, unless he satisfies the officers of the State Department, their consuls, or ministers to the contrary, would authorize the State Department to refuse to extend him protection. It can not affect any other rights, which, of course, he can present in court. No presumption is conclusive on a court. It is a mere presumption, but the presumption would protect the State Department. That is the object of the bill and the result of the bill and the only result of it.'"

Requirements of Act of March 2, 1907.

The act of 1907 (Chap. 2534, 34 Stat. 1228, 1229),

is entitled "An Act in reference to the expatriation of citizens and their protection abroad." Its provisions thus have reference to those two distinct objects. The first sentence of Section 2 provides two conditions and two only in which an American citizen shall be deemed to have expatriated himself:

1. "When he has been naturalized in any foreign state in conformity with its laws";
2. "When he has taken an oath of allegiance to any foreign state."

Neither of these acts took place in the present case. The provision immediately following as to residence for two years in a foreign state from which he came merely creates a presumption which may be overcome. No mention of expatriation or of cancellation of citizenship is contained in this second clause of Section 2. Congress is not to be deemed to have intended to prescribe a forfeiture of citizenship to residents abroad in the absence of explicit language to that effect.

Construction of State Department.

The construction placed upon the provision by the State Department is shown by a statement of Hon. Fred K. Nielsen, solicitor of that department, June 8, 1922, in the hearings before the House Committee on Immigration and Naturalization, 67th Congress, 2d Sess. Serial 5–B, 'Naturalization and Citizenship of Women," pp. 576, 577, 578:

"Now, let me pass to the act of March 2, 1907, in regard to expatriation, as we call it, by continued residence abroad. I do not see why you inject that feature into any pending legislation. The law says that persons who live abroad for a certain period shall be under the presumption that they have ceased to be American citizens.

"The court of last resort has never construed that very disagreeable provision. The Federal courts have differed on it; attorneys general have differed on it. Mr. Wickersham once said that it simply meant that a person living abroad for a stated period should not be regarded as entitled to the protection of his Government while so resident. That is the rule that the Department of State is proceeding on. And for many reasons which I would not bother you with I think that is the only sound rule.

* * * * * * * * *

"Mr. Kleczka. If I understood you correctly, you said that the Department of State followed some court ruling holding that an American citizen living abroad more than two years has not lost his American citizenship—that is, during the first two years he does not lose his right of protection?

"Mr. Nielsen. No; not until after the two years.

"Mr. Kleczka. After the two years he loses it?

"Mr. Nielsen. Nothing happens to him until he has been absent two years in the country of his origin, or five years in any other country. But unless he follows a certain procedure prescribed by statute, after those periods he is regarded as losing the right to protection.

"Mr. Kleczka. But not his citizenship?

"Mr. Nielsen. But not his citizenship.

"Mr. Kleczka. Notwithstanding that the law says he shall be deemed to have lost his citizenship?

"Mr. Nielsen. Yes; but that is very different from saying that his citizenship is cancelled. You create citizenship by judicial action, and you cancel it by judicial action; and I hope nobody will ever take the view that Congress has enacted a statute whereby you can cancel citizenship by a mere administrative procedure not specifically described."

In American Journal of International Law, Vol. 8, 1914, in "Observations on the New German Law of Nationality," by Mr. Richard W. Flournoy, Jr., assistant solicitor of the State Department, it was said of the clause in question (p. 483):

"The precise meaning and effect of the statutory provision last quoted was for some time in doubt, but it seems to be pretty generally agreed now that its object is to furnish a definite rule for determining when protection should be withdrawn from naturalized citizens residing abroad, and that the presumption which it raises never becomes conclusive and is cancelled in case the person concerned returns to this country to reside permanently."

Other Authorities.

In *re Wildberger*, 214 Fed. 508, the court said of the act under consideration:

"The provisions of the act of March 2, 1907, are highly penal, and therefore by every accepted canon of construction are not to be extended to include any persons not within its purview."

In *Sinjen* v. *Miller*, 281 Fed. 889, the court said in regard to alleged expatriation of an American citizen of German birth (p. 891):

"I am convinced that the plaintiff is telling the exact truth when he swears that he at all times considered himself an American citizen, that he never intended to or did renounce his allegiance to this government, and that his intention to return hither for permanent domicile was fixed and abiding in his mind at all times."

This decree was affirmed by the Circuit Court of Appeals, *Miller* v. *Sinjen*, 289 Fed. 388. The case was one of a native of Germany, and reference was there made to the act of March 4, 1923, to amend the Trading with the Enemy Act (42 Stat. 1511, 1516, Chap. 285):

"Sec. 21. That the claim of any naturalized American citizen under the provisions of this Act shall not be denied on the ground of any presumption of expatria-

tion which has arisen against him, under the second sentence of section 2 of the Act entitled 'An Act in reference to the expatriation of citizens and their protection abroad,' approved March 2, 1907, if he shall give satisfactory evidence to the President, or the court, as the case may be, of his uninterrupted loyalty to the United States during his absence, and that he has returned to the United States, or that he, although desiring to return, has been prevented from so returning by circumstances beyond his control."

While this provision has no direct bearing on the present case, it does show the legislative construction of Sec. 2 of the act of March 2, 1907, just as the cases we are citing show the judicial construction. It will not be supposed that Congress was here extending a special privilege to German born citizens claiming the return of their property from the Alien Property Custodian, while withhholding the same right from a naturalized American citizen born in a friendly country and who had worn with honor and was still entitled to wear the uniform of the United States Navy.

The court (289 Fed. 392) thus specifically approved the above quoted opinion of Attorney General Wickersham:

"We are strongly impressed with the reasoning and with the conclusion of the Attorney General in 28 Op. Atty. Gen. 504, to the effect that the Act of March 2, 1907, has no application to the case of a naturalized citizen, who, having returned to his native country and resided there more than two years, has thereafter returned to the United States, but that the act is limited to naturalized citizens while residing in foreign countries beyond the period stated in the act."

In *United States* v. *Knight*, 291 Fed. 129, the court said on direct application of the government to cancel a certificate of naturalization (p. 134):

"It must be borne in mind these proceedings are to annul a solemn judicial grant of and by the United States to defendant, and 'nothing will warrant cancellation of his grant of citizenship but clear, unequivocal, and convincing evidence, that in quantity and quality inspires confidence and produces conviction of the truth of the charge virtually beyond reasonable doubt.' *U. S.* v. *Sharrock*, (D. C.) 276 Fed. 32."

In *Banning* v. *Penrose*, 255 Fed. 159, 161, the court said:

"The United States attorney also insists that, even if Banning was properly naturalized, he afterwards expatriated himself by his conduct in going to Germany and residing there some time, in Berlin. The authorities all are (and it would be useless to refer specifically to them) that a man who has become a naturalized citizen of one country, and goes back to the country of his origin, may stay there indefinitely, if his purpose is, all the time, in his mind, to retain his citizenship in the country of his adoption and to return there some time in the future. It is a question more of intention than anything else. That is the law as contained in all the decisions and the state papers read by counsel in this argument. Of course, various questions arise as to how his intention can be shown and in what way it can be shown.

"I do not think that there is anything in this case to show clearly that Mr. Banning ever intended not returning to the United States. On the contrary, every part of the evidence, which I will not undertake to go into in detail, and some of it very strongly, indicates that his intention was to retain his home in the country of his adoption. The evidence very clearly shows that Banning had an old father in Germany to whom he was devoted and whom he desired frequently to visit, and this seems to have been very largely the motive which actuated him in going over there, while from his own evidence it is clear that he enjoyed the life of Berlin and had rooms, as if expecting to remain there a while.

"Believing that he was regularly naturalized, the evidence that he intended to take up a permanent residence in Germany should be reasonably clear. It is not so here."

Of course all this applies with greatly added force to an officer of the Navy having express permission from the Department to reside abroad indefinitely.

The presumption arising under Sec. 2 of the act of 1907, is no stronger than that established by Sec. 15 of the act of June 29, 1906 (34 Stat. 596, 601, Chap. 3592), that a naturalized citizen taking up permanent residence in a foreign country within five years of his naturalization shall be presumed to have become naturalized without intention to become a permanent citizen of the United States.

This court has said in regard to that section, *Luria* v. *United States*, 231 U. S. 9, 25:

"It will be observed that this provision prescribes a rule of evidence, not of substantive right. It goes no farther than to establish a rebuttable presumption which the possessor of the certificate is free to overcome."

Status of Naturalized Citizens.

The act of July 27, 1868 (Chap. 249, 15 Stat. 223), embodied in Revised Statutes, Secs. 1999, 2000, 2001, states a fundamental principle as to the equality of right of a naturalized with a natural born citizen of the United States. Under it every United States citizen of foreign birth has precisely the same rights and is entitled to the same protection as one born in the United States.

In *United States* v. *Wong Kim Ark*, 169 U. S. 649, this court decided that a person of pure Chinese blood born within the United States is a native born citizen.

The rule contended for by the United States would extend to such persons the protection of our laws to an extent beyond that accorded to Americans of the type of Carl Schurz, Franklin K. Lane, or Knute Nelson, just because each of these splendid exemplifications of Americanism happened to be born under a foreign flag. A view so contrary to the first principles of American citizenship should be repudiated.

The Officer not Within the Act of 1907.

The Court of Claims on this point says (pp. 9, 10):

"From the facts proved it appears that the plaintiff does not come within the provisions of the act. He was an officer of the United States Navy who went abroad with the permission of the Navy Department; that permission was repeatedly renewed, and while living in Switzerland under this permission of the department his pay as such officer is taken from him without any reason therefor being given to him. It is true that, acting upon the opinion of a subordinate officer of the department that he had expatriated himself, his pay was stopped. But all the facts in the case were apparently not submitted to the department, and even if they had been we are of opinion that it was not in the province of the Navy Department, or of any of its officers, to pass upon the rights of the plaintiff and to declare that he had expatriated himself, and thereby to dismiss him from the Navy, and take from him his retired pay to which he was entitled under the law, and which he had earned by long active service in the Navy. The act of March 2, 1907, was only intended to authorize the State Department to refuse to extend its protection to citizens who, having remained in a foreign country two or five years continuously, failed to satisfy the officers of the State Department that they intended to return to and reside in the United States. The act does not affect any other rights.

"In the case at bar the plaintiff, when his attention was called to the fact that he had resided in Switzer-

land, the country of his birth, for more than two years continuously, promptly made the affidavit required of him by the consular officer. He complied with the law, although he might well have insisted that he did not come under its provisions, and having complied with it, and rebutted the presumption raised by the statute, he can not now be held to have expatriated himself. He presented satisfactory evidence to a consular officer of the United States of his intention to return to and live in the United States.

"The fact that the affidavit was not sent to the Department of State has nothing to do with its force and effect, for, as far as this record shows, it was not necessary to its validity that it should be forwarded to the department. Having once made the affidavit it was not necessary under the provisions of the act to make one every two years.

"The facts show that the plaintiff intended to return to the United States to live; and moreover, it is shown that the plaintiff when war was declared promptly tendered his services to his Government.

"The court is of opinion that the plaintiff has not expatriated himself, and is still a citizen of the United States. He is therefore entitled to all his rights as such, and is entitled to his pay as a retired officer of the Navy from May 1, 1916, up to the present time."

No presumption of expatriation of a naturalized American citizen who is also an officer of the Navy can be indulged where his residence abroad is by permission of the Navy Department to which he is responsible.

Shortly after his retirement from active service, he was in 1909, granted permission to leave the limits of the United States for a period of one year from September 16, 1909. August 17, 1910, he was authorized to remain abroad for one year from September 16, 1910. September 12, 1911, he was authorized to remain abroad for a period of one year. August 30, 1912, he was authorized to remain abroad beyond the limits of the United States indefinitely (Finding III, foot p. 5).

The Bureau of Navigation was kept informed of his address by letters written annually or oftener (top p. 6). The Navy Registers as we have seen (end of Finding III, rec. middle p. 7, *ante*, *p.* 6), show him during all this period down to and including January 1, 1917, as residing abroad, so that his residence in his native country was not only with full knowledge of the Navy Department but by its express authority. Under these circumstances no possible presumption of abandonment of citizenship could arise. The mere fact that he was residing abroad by departmental permission, coupled with the fact that the Navy Department at any time had power to revoke his permission to go beyond the limits of the United States is sufficient to rebut any presumption of abandonment of American citizenship.

The Navy Regulations of 1909, which were in force when this officer first went abroad provide (Art. 234):

"(1) Every officer of the Navy or the Marine Corps shall keep the Bureau of Navigation or the commandant of the Marine Corps, respectively, informed of his usual residence and of the address of his wife or next of kin. When ordered to his home he shall, upon the receipt of the order, certify upon it his place of residence, which must in all cases correspond to that which he has previously reported to the Bureau of Navigation or Headquarters of the Marine Corps.

"(2) No officer, active or retired, shall change his usual residence without permission of the Bureau of Navigation."

Also from same Regulations, Art. 1526:

"Permission to leave the United States will be granted only by the Secretary of the Navy."

Similar provisions are in the later Naval Instructions of 1913, Arts. 704, 705, 706, referred to in the findings top p. 6.

Notwithstanding that the officer was not within the terms of Sec. 2 of the act of 1907, he complied with it.

Nothing in either the law or regulations prescribe how often the affidavit to overcome the presumption of expatriation should be repeated. He made one or more such affidavits (rec. p. 6, end of 1st par.), one being in 1912 (p. 6, end of 2d par.). A failure, if any occurred, to register annually at the American Consulate affected no right of citizenship.

The following finding of the Court of Claims absolutely rebuts any presumption of any intent to abandon his American citizenship:

"He has always borne true faith and allegiance to the United States and has done no act inconsistent with his allegiance nor with his status as an officer of the United States Navy." (Finding II, middle p. 5.)

Evidence and Findings.

The opinion of the Court of Claims concludes as follows (top p. 10):

"The defendant's attorney has asked us to make certain findings based upon affidavits made by certain officers of the Government. These affidavits are merely ex parte statements and are not competent evidence. The persons who made the affidavits could have been examined by the defendant. The fact that they were not leaves the court to infer that the evidence which they might have given would not have stood the test of scrutiny. At all events there is no reason to depart from a long and well established rule.

"For the reasons above given the court is of opinion that the plaintiff is entitled to recover. It is so ordered."

The rules excluding affidavits as evidence of facts are in full force in the Court of Claims.

In *Moore* v. *United States*, 91 U. S. 270, this court said (p. 274):

"We think that where Congress has not provided, and no special reason demands, a different rule, the rules of evidence as found in the common law ought to govern the action of the Court of Claims."

The statute requires that each party have an opportunity to examine the witnesses of the other. (Judicial Code, Sec. 169, March 3, 1911, Chap. 231, 36 Stat. 1140.)

The rules of this court with reference to appeals from the Court of Claims exclude the sending up of any evidence and make the findings of fact conclusive.

This court has said in *Desmare* v. *United States* (93 U. S. 605, 610):

"The findings of the Court of Claims furnish the facts we are to consider, and we can not look beyond them. For the purposes of this case they import absolute verity and conclude both parties."

In *United States* v. *Anciens Etablissements* (224 U. S. 309, 330) the court said:

"The finding determines the matter, being in the nature of a special verdict of a jury."

Thus the findings are conclusive in this court on appeal. No different case can be presented here from that shown in the findings of the Court of Claims.

Robinson v. *Baltimore & Ohio R. R. Co.* 222 U. S. 506, 512;
Givens v. *Zerbst*, 255 U. S. 11, 22;
Nagle v. *United States*, 145 Fed. 302, 306;
Sturla v. *Freccia*, L. R. 5 Appeal Cases, 623, 643.

CONCLUSION.

This officer served faithfully on the active list of the Navy as an enlisted man and warrant officer for over twenty years. He became a naturalized citizen of the United States after the performance of enlisted service but before being appointed to office in the Navy. He was retired in 1908 for disability incurred in the course of his long and faithful service. After his retirement, he each year requested and obtained permission to be allowed to remain abroad, until in 1912 the permission was made indefinite as to time. Unless such permission can be used as a trap for the unwary, he can not be held to have abandoned his American citizenship so long as he was availing himself thereof. On January 11, 1916, he was officially notified by the Director of Naval Intelligence of the Navy Department that he had been slated for duty in time of war (Finding III, middle p. 6). This shows that the permission to remain abroad was regarded as still continuing in force. His permission to remain abroad was expressly recognized by the statement made in that letter, "should you remain abroad indefinitely, and opportunity offer, it is requested that you confer with the naval attaché at Paris." (Finding III, middle p. 6.) With this last direction he fully and strictly complied (last half p. 6, top p. 7). Only shortly afterwards he was notified that his pay was stopped. His name continued to appear on the Navy Register after as well as before the stoppage of his pay. Inquiry as to the reason for the stoppage and a statement of his readiness to answer for his actions met with no response. After the outbreak of the war, he still received a circular letter addressed to all retired officers and November 12, 1917, he wrote the Bureau of Navigation "stating that he was able to perform sea or

shore duty; that his health was in very good condition, and that the deafness for which he was retired was improving; that he could speak French fluently; and that a call to any duty to which the department would see fit to assign him would be gladly received." (Finding III, one-third down p. 7.)

His declarations and conduct at all times have been those of a loyal citizen of the United States and a faithful officer of its Navy. He has never been removed from office. He therefore still holds office and is entitled to its emoluments. His treatment by executive officers of the Government has been singularly undeserved by one who served his country faithfully for twenty years, received a medal of honor, and incurred physical disability in her service.

We can not more appropriately conclude this brief than with the eloquent words of Attorney General Jeremiah S. Black in his report on Navy cases, 9 Opns. 212, 216:

"To strike a lawyer or a seaman in the middle or in the decline of life ignominiously from the rolls of his profession, is an injury far more severe than to confiscate the lands of the farmer or the goods of a merchant. It may be that some of our naval officers have committed crimes atrocious enough to deserve this extreme and frightful penalty, but God in his mercy forbid that the people of this nation shall ever become tame enough patiently to see it inflicted even on the guilty, without the full sanction of their ordained and established law."

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